Supreme Court, U.S.
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No. 97-2082

In The

Supreme Court of the United States

October Term, 1997

DEPUTY PAUL THRASH,

Petitioner,

v.

HERBERT GULLIFORD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The Respondent, Herbert Gulliford, opposes the petition of Deputy Paul Thrash for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

It should be noted that the text of the Revised Code of Washington § 9A.76.020 (hereinafter RCW 9A.76.020), as provided to this Court by the Petitioner, is *incorrect*. (Pet. App. C. IV.) Petitioner cites the 1995 version of the statute, which is substantially different from the 1975 version in place at the time of this incident in 1992:

> "**9A.76.020 Obstructing a public servant.** Every person who, (1) without lawful excuse shall refuse or knowingly fail to make or furnish any statement, report, or information lawfully required by him by a public servant, or (2) in any such statement or report shall make any knowingly untrue statement to a public servant, or (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor." (1975 1st ex.s. c 260 § 9A.76.020)[1]

[1] Sections 1 and 2 of the statute had been found to be unconstitutional by the Washington State Supreme Court in *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982), ten years before Mr. Gulliford was arrested. Mr. Gulliford was arrested for violation of Section 3 of the statute.

STATEMENT OF THE CASE

Petitioner Thrash has attempted to re-write the facts of this case, using more than six pages to do so. Because Petitioner's Questions 1 and 2, as posed to this Court, are based upon his misrepresentations of these facts, it is necessary to review what actually happened on Herron Island.

Deputy Thrash, as he tried to do at the appellate level, attempts to disparage Mr. Gulliford by citing a plethora of incidents which occurred weeks or months before the incident in question, involving other people when Mr. Gulliford was not present, and frequently, incidents which occurred when Mr. Gulliford was not even in the State of Washington. The accuracy of the representations of these incidents will not be debated, as they are irrelevant to the instant case.

Petitioner continues to insist that Mr. Gulliford "fail[ed] to disperse." (Pet. 5.)

Deputy Thrash completely neglects to mention that the entire episode was recorded on videotape with sound recording.[2] (Ex. 10.) In reaching their decision, the Court of Appeals had access to Exhibit 10, and viewed it before hearing oral arguments in the case.

Ex. 10 shows that the first order to disperse was issued after Mr. Gulliford was already on the ground, pulled down from behind by Deputy Thrash. Deputy

---

[2] The videographer, Curt Bray, an island teenager and Eagle Scout, was also arrested for Obstructing A Public Servant that night, but was also never charged with a crime. (Exs. 10 and 12.)

Terrill Larson yelled, "Disperse, disperse, that's *once*, you've been warned." Mr. Gulliford was already under arrest at that time, face down in the beach sand with Deputy Thrash on top of him, kneeing him in the neck. (Ex. 10.)

Thrash further neglects to mention that Mr. Gulliford had no part in the events earlier on the day in question. There are no allegations in any of the evidence that Mr. Gulliford did anything other than to arrive at the community beach shortly before the deputies did.

The deputies were looking for a man named J.D. After arresting (and apparently un-arresting) a Mr. Petersen – the wrong person, Deputy Thrash addressed the crowd, cursing at them and telling a woman who spoke to "Shut up, just shut up!" (Ex. 10.)

As Deputy Thrash lectured this group of mostly middle-aged people, and in response to Thrash's statement, "This is a waste of government . . . ,", Gulliford responded in a conversational tone, "Then why don't you hop on the ferry, hop on the ferry and go back." (Ex. 10. *See also Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998) at page 1347.)

In the words of Deputy Patrick Donnelly, "U 147 [Thrash] walked around the fire and grabbed Mr. Gulliford from behind and pulled him over backwards." (Ex. 13.)

Each of the deputies agree that Mr. Gulliford never moved, opened his mouth to express his opinion in a single sentence, and was immediately arrested. (Exs. 10, 12, 13 and 14. An accurate summary of the pertinent parts

of the police reports can be found in *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998) at n. 7.)

Petitioner refers to the "rebellious" (Pet. 5), "drunken" (Pet. 4), "agitated" (Pet. 7), "disturbing the peace" (Pet. 2), "threatening" (Pet. 2), "large" (Pet. 3, n. 2), "hostile" (Pet. 3, n. 2), crowd.

Ex. 10 shows a group of approximately fifteen people, some as old as 70, none of whom was armed, none of whom made a physical move toward the deputies, and none of whom was threatening the officers.

In actual fact, the most threatening behavior presented that night occurred when the officers were physically beating Mr. Gulliford, and this crowd of mostly middle-aged people shouted promises to call their respective lawyers in the morning. (Ex. 10.) Perhaps a frightening thought, but certainly not a crime.

Petitioner states that there were only three "available Deputies" (Pet. 4) to respond to the call, and that the officers were outnumbered "four or five to one[.]" In addition to the three Pierce County Sheriff's Deputies, a Washington State Patrol Trooper and three members of Pierce County Fire District #16 were also at the scene. Two more firefighters were standing by the fire engine, one-half block away.

Thrash specifically states (Pet. 5) that Mr. Gulliford had an "admitted intent of preventing J.D.'s arrest[.]" *Nothing* in the record reflects that Mr. Gulliford wished or intended or attempted, in any way, to *prevent* J.D.'s arrest. The citations listed by Thrash to support this accusation are devoid of evidence that the assertion is true.

In fact, J.D. was never arrested (that night or at a later date), neither Mr. Gulliford nor videographer Bray was ever charged with a crime, much less convicted of one, and even the beachfire which seemed to be of such concern was allowed to burn itself out the next day. (Exs. 16b, 16c and 16d.)

REASONS FOR DENYING THE WRIT

I.

WHETHER PROTECTED SPEECH SHIELDS PHYSICAL CRIMINAL ACTS NEED NOT BE DECIDED IN THIS MATTER

A. The Issue Of Whether Protected Speech Shields Otherwise Unlawful Physical Acts Has Repeatedly Been Decided

Petitioner asks whether speech, if it is uttered after a suspect physically commits a crime, shields the speaker from arrest.

As the long history of established case law demonstrates, this question has already been decided over and over again. (*E.g., Wisconsin v. Mitchell*, 508 U.S. 476 (1993); *U.S. v. Brice*, 926 F.2d 925, 931 (9th Cir. 1991); *U.S. v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987); *Cox v. Louisiana*, 379 U.S. 536 (1965.)) Speech does not shield physical crimes.

B. As No Physical Acts Occurred In This Matter, The Issue Is Irrelevant

Mr. Gulliford never performed *any* physical acts, much less a physical act which constituted a crime.

> "Here, the jury more probably than not found that Deputy Thrash had probable cause to arrest Gulliford based on his words alone because that is all Gulliford did – he spoke." *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998) at 1350.

After a three week trial, the District Court made the same finding, stating in Jury Instruction Number 15, in pertinent part:

> "You should not consider whether there was probable cause to arrest for *other crimes* in making the determination of whether there was probable cause to arrest." (Jury Instruction Number 15, paragraph 3.) (Emphasis added.)

Petitioner cites dicta from a footnote to *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-63 (1987) to support his case. (Pet. 11.) Yet even this footnote dicta supports Mr. Gulliford's position. He did not run alongside an officer chasing a fleeing felon, or persistently try to engage an officer in conversation who was attempting to direct traffic at a busy intersection. Mr. Gulliford never moved, verbally expressed his opinion in a single sentence, and was arrested.

Nowhere in his Petition (other than a brief reference at n. 4 (Pet. 10)) does the Petitioner address the finding of the Court of Appeals that Jury Instruction Number 15 was an inaccurate statement of the law. Nor does the

Petitioner seriously argue that the decision, which found that the instruction "misstates the law or is at best misleading", is incorrect. *Gulliford v. Pierce County*, 136 F.3d at 1350.

At n. 4 (Pet. 10), Thrash contends that, by separating Jury Instruction Number 15 into partial sentences, it can be interpreted to state that verbal opposition is always protected by the First Amendment, but other "non-verbal" challenges can be probable cause for arrest.

This tortured interpretation of the jury instruction was first advanced at the end of oral arguments before the Court of Appeals. The relegation of this contention to a footnote in the Petition accurately reflects its legal import. The Petitioner cannot seriously be asking this Court to split a sentence in half, and interpret it to infer precisely the opposite of its obvious meaning.

The Petitioner has sought to have this Court decide a manufactured question, not reflected by the facts of this case, and one which has nothing to do with the proper finding of the Ninth Circuit Court of Appeals.

II.

QUALIFIED IMMUNITY IS NOT AT ISSUE IN THIS MATTER

A. Qualified Immunity Is Not Properly Before This Court

The Petitioner almost completely ignores the ruling of the Court of Appeals – that the issue of qualified immunity was not properly before the Court as the

Appellees failed to cross-appeal from the District Court's denial of qualified immunity for the deputies.

The Petitioner addresses this ruling only in a single paragraph in a footnote to his brief. (Pet. 16 at n. 6.) With apparent arrogance, Petitioner states that because he prevailed at the trial court level (using the improper and incorrect jury instruction), the Appellees did not believe it was necessary to appeal the denial of their petition for qualified immunity.

Yet substantial case law supports the ruling of the Court of Appeals. *Spurlock v. F.B.I.*, 69 F.3d 1010, 1018 (9th Cir. 1995), ("[A]n appellee who fails to file a cross-appeal cannot attack a judgment with a view toward enlarging its own rights.) *See also Turpen v. City of Corvallis*, 26 F.3d 978, 980 (9th Cir.), *cert. denied*, 513 U.S. 963 (1994); *Housing Auth. v. Ponca City*, 952 F.2d 1183, 1195 (10th Cir. 1991), ("An appellee may present an argument on appeal only if it does not enlarge the rights conferred by the original judgment."); *Texas Commerce Bank Nat. Ass'n. v. National Royalty Corp.*, 799 F.2d 1081, 1083 (5th Cir. 1986), (Appellee who failed to file cross-appeal could not attack judgment with view toward enlarging rights.)

The question of qualified immunity is not properly before the Supreme Court, as it was not properly before the Court of Appeals.

B. Qualified Immunity Does Not Protect Officers From Behavior Which Is Clearly Established To Be Unconstitutional

Assuming arguendo that the Petitioner's procedural problems are overlooked by this Court, Petitioner poses an interesting question: whether police following state court precedent are entitled to qualified immunity, even if the federal court interprets the same provision differently.

However, this question has no relation at all to the matter at bar. The state court precedent, *State v. Lalonde*, 35 Wn.App. 54, 61-62, 665 P.2d 421 (1983), is identical to the federal precedents, including *Mackinney v. Nielsen*, 69 F.3d 1002 (9th Cir. 1995); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1994); *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-63 (1987); *Lewis v. City of New Orleans*, 415 U.S. 130, 132-134 (1974); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); and so many others.

Contrary to Petitioner's representation, in *Lalonde* the officers had already been physically attacked twice by other party-goers. Lalonde persisted in physically approaching the officers, was repeatedly told to get back, was physically *pushed* back, and when he physically approached yet again, was arrested.

In upholding a guilty verdict against Mr. Lalonde for Obstructing a Public Servant, the Washington State Court of Appeals wrote in *State v. Lalonde*, 35 Wn.App. 54, 665 P.2d 421 (1983) at page 61: "Lalonde's offense did not arise from his speech, but from the acts which accompanied his words."

Even while refusing to examine the issue of qualified immunity because of Appellees' failure to cross-appeal, the Court of Appeals noted that the right to verbally question the actions of police was "sufficiently clear" so that a reasonable officer could understand that he or she was violating the right. *Gulliford v. Pierce County*, 136 F.3d at 1351.

Petitioner cites *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), yet *Anderson*, supra, specifically concurs with *Gulliford v. Pierce County*, supra:

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citations omitted,] but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Pre-existing Washington State and federal law, dating back many decades, all concur that such speech is not a crime, and "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-63 (1987) at pages 462-463.

State v. Lalonde, 35 Wn.App. 54, 665 P.2d 421 (1983), which reinforced that speech alone was not a crime and was not criminalized by RCW 9A.76.020, was decided *nine* years before Mr. Gulliford was arrested.

This Ninth Circuit Court of Appeals ruling directly complies with, and reinforces, the Washington State Court of Appeals decision in *State v. Lalonde*, supra, that only acts may be criminalized, not speech alone.

It is alleged by the Petitioner that the Court of Appeals did not address prior Supreme Court law such as *City of Houston, Texas v. Hill*, 482 U.S. 451, 461-63 (1987) and *U.S. v. Brice*, 926 F.2d 925, 931 (9th Cir. 1991). This is untrue. The panel cited extensively from *Hill*, supra, stating that the facts of *Hill* and its progeny were "indistinguishable" from those of this case. *Gulliford v. Pierce County*, 136 F.3d at 1350. *Brice*, supra, and several other cases cited by the Appellees, had facts too dissimilar to be useful.

Petitioner states that the majority held that Mr. Gulliford's non-verbal actions before and during his arrest were constitutionally irrelevant and that once Gulliford spoke, he could only be arrested if the words were fighting words. (Pet. 16.)

To the contrary. The Court of Appeals did not rule that Mr. Gulliford's "non-verbal actions" were irrelevant – they ruled that they were *non-existent*. All Mr. Gulliford did was to speak.

Petitioner again attempts to convince this Court to decide a question which is not even remotely related to the facts and the law of this case. Mr. Gulliford did nothing but speak, and all of the precedents, state and federal, are completely consistent on this issue – speech alone, even when it is critical of police or their actions, is not a crime.

III.

AN EXAMINATION OF COURT OF APPEALS DISCRETION REGARDING INSTRUCTIONAL ISSUES IS IRRELEVANT IN THIS CASE

A. Because This Issue Was Repeatedly Raised Before The Trial Court, Petitioner's Question Regarding Issues Which Were "Never Raised" Is Inappropriate

Yet again, Petitioner misstates the facts upon which his question rests. Petitioner asks whether a jury's verdict may be reversed based upon an instructional error "never raised" at trial. (Pet. 22.) The entire premise of the question is false, and has been mischaracterized to this Court.

As the record shows, and as the Court of Appeals found, Gulliford raised these issues in the District Court repeatedly, stating that Mr. Gulliford's speech was not a crime as a matter of law, that the First Amendment protected such speech, that RCW 9A.76.020 did not criminalize such speech, that Mr. Gulliford could not have violated RCW 9A.76.020 simply by speaking (thus creating probable cause for a misdemeanor arrest), and that the previous cases regarding this Washington State statute (including *State v. Lalonde*, 35 Wn.App. 54, 61-62, 665 P.2d 421 (1983)) supported Mr. Gulliford's contentions:

- on 11/30/95[3], in "Plaintiff's Brief in Response to Defendants' Motion for Partial Summary Judgment" (CR 34, 13-15 and 18-21), stating in part:

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[3] The trial of this matter began on 03/18/96, and was sent to the jury on 04/05/96.

> "The Washington cases cited [by Defendants] are both distinguishable on their face from the instant case in that they both involved defendants who took physical actions in addition to making verbal statements."[4]

- on 12/21/95, in "Plaintiff's Motion for Partial Summary Judgment" (CR 61, 12-13 and 17-19), stating in part:

> "[T]he court upheld a person's conviction for obstruction because of his physical actions, not his words.";
>
> and,
>
> "In addition, Mr. Gulliford cannot be arrested for these crimes because his speech was protected by the First Amendment.".

- on 01/18/96, in "Plaintiff's Memorandum in Reply to Defendants' Brief Opposing Partial Summary Judgment" (CR 68, 6-8), stating in part:

> "Amazingly, the Defendants now claim that the crime of obstructing does not require more than speech to convict when the Defendants admit in the same memorandum that it does take 'more than speech to convict'[.]";
>
> and,

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[4] The second case referred to in this quote was *State v. Kirvin*, 37 Wn.App. 452, 682 P.2d 919 (1984), cited by the Defendants, but which actually made *no* mention at all of RCW 9A.76.020.

> "The defendants do not deny that Mr. Gulliford did not act, and the videotape of the incident clearly shows that he did not act. Therefore, the officers did not have probable cause to arrest Mr. Gulliford for obstructing."

- on 03/15/96, in "Plaintiff's Trial Brief" (CR 113, pp. 7-8), stating in part:

> "Lastly, and most important, the court stated in Lalonde that it was the defendant's actions, *not his words*, that caused the offense. In this case, Mr. Gulliford did not act."

- on 04/05/97, in "Proposed Jury Instruction 31" (CR 141) stating:

> "The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not involve a threat or fighting words."

- on 04/05/97, during an unrecorded session *in camera*, Plaintiff's counsel moved for a Directed Verdict on Liability, because Mr. Gulliford's speech *could not* be grounds for an arrest for obstructing, and also argued against the Court's and the Defendants' incorrect interpretation of the obstructing statute – that verbal comments alone *could* be in violation of the obstructing statute and therefore not protected by the First Amendment. During oral arguments before the Court of Appeals, Petitioner's counsel *admitted* that this was true. (*See Gulliford v. Pierce County*, 136 F.3d at 1349.)

- on 04/08/96, during oral arguments regarding Jury Instructions (CR 162, RT 2-3), Plaintiff's co-counsel, Bertha Fitzer, began delineating Plaintiff's objections to Jury Instruction Number 15 and its reference to the First Amendment, when the District Court judge *interrupted* her, clearly spelling out his ruling from the previous Friday – his belief that words alone *could* violate the Washington State obstructing statute:

  > "I think the jury has to balance between that right to speak and the right to speak improperly as obstructing."

- on 04/18/96, in "Plaintiff's Memorandum in Support of Motion for New Trial/JNOV" (CR 154, 1-5, 9), stating in part:

  > "The Ninth circuit and Washington state preclude application of the statute in question to speech alone. Because the court's application of RCW 9A.76.020(3) was unconstitutional, the jury's verdict based upon that law is in error.";
  >
  > and,
  >
  > "Herbert Gulliford was arrested for his statements. His claim of unlawful arrest should never have been submitted to the jury. Instead, this court should have recognized that application of the obstruction statute to speech alone is constitutionally invalid. A new trial, limited to damages, is thus required."

- on 05/02/96, in "Plaintiff's Reply Re: Motion for New Trial" (CR 157, 1-4), stating in part:

> "But [here] there was no "conduct", there was only speech. Application of RCW 9A.76.020 to Herbert Gulliford violated his First Amendment rights as a matter of law."

Petitioner's claim that Gulliford affirmatively misled the District Court (Pet. 25) is also without foundation, and is the result of Petitioner's continued misrepresentation of the District Court record.

In the judge's "Order Denying Plaintiff's Motion for New Trial/JNOV" (CR 156), the judge admitted that Mr. Gulliford had raised this issue again and again, ruling in part:

> "The issues raised by plaintiff were fully discussed and considered at trial[.]"

Unfortunately, the District Court judge believed that RCW 9A.76.020 *did* apply to speech alone, which was reflected in his response to Mr. Gulliford's objection to Jury Instruction Number 15, stating that there needs to be a "balance" between the First Amendment right of free speech and the state obstructing statute.

Jury Instruction 15, in its last paragraph, exactly stated the District Court judge's view:

> "The First Amendment protects the right of citizens to verbally oppose and/or challenge police action without risking arrest so long as that challenge does not knowingly hinder, delay, or obstruct any public servant in the discharge of the public servant's official powers or duties."

The District Court judge felt that speech which so much as "delayed" an officer, even for the shortest period

of time, *could* be considered a crime under RCW 9A.76.020.

Clearly, Respondent Gulliford had informed the District Court of his objections to the District Court's interpretation of RCW 9A.76.020, its state law implications, and its First and Fourth Amendment repercussions, throughout the District Court case, and the Court itself readily admitted this.

B. The Ninth Circuit Is Already The Most Strict Circuit In Interpreting Fed.R.Civ.P. 51

Indeed, the Ninth Circuit Court of Appeals is the most strict Circuit in its application of Fed.R.Civ.P. 51. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1326 (9th Cir. 1993); *United States v. Payne*, 944 F.2d 1458, 1464 (9th Cir. 1991), *cert. denied*, 503 U.S. 975 (1992); *McGonigle v. Combs*, 968 F.2d 810, 823 (9th Cir.), *cert. dismissed*, 506 U.S. 948 (1992); *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991); *Grosvenor Properties Ltd. v. Southmark Corp.*, 896 F.2d 1149, 1152-53 (9th Cir. 1990); and *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367 (9th Cir. 1979.)

That has not been altered in the least by the decision in *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998.)

Petitioner Thrash cites 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2558 at 468, n. 14 (1994.) The full quotation from that reference states:

> "Nevertheless the Ninth and Seventh Circuits stand alone in reading Civil Rule 51 literally and denying that there is any power to reverse for

> plain error in an unobjected to instruction to the jury in a civil case."

It should be noted that Respondent Gulliford has never claimed "plain error" in the instant case. Rather, Mr. Gulliford has claimed that throughout the case he had repeatedly informed the District Court of his objection to the Court's interpretation of RCW 9A.76.020, and the resultant incorrect jury instruction.

Additionally, Petitioner appears to be asking this Court to intervene, and to force the Ninth Circuit, already the most strict circuit in its interpretation of Fed.R.Civ.P. 51, to be even *more* strict.

After being informed of "Petitioner's Suggestion for Rehearing En Banc", and having had the opportunity to read Judge O'Scannlain's dissent (which pertained solely to the instructional issue), *not a single member* of the full panel of the Ninth Circuit Court of Appeals asked that a vote be taken as to whether to rehear the matter en banc. (Pet. App. B.)

This resounding rejection of Judge O'Scannlain's dissent regarding incorrect jury instructions and the necessary objections thereto demonstrates that there is not even an intra-circuit conflict, much less an inter-circuit conflict.

CONCLUSION

Although all three of the questions posed by the Petitioner purport to be worthwhile issues for this Court to address, not one of the questions even remotely corresponds to the facts, law and legal history of this case.

The Petitioner has mischaracterized, misstated, and misrepresented facts and law in his Petition for Writ of Certiorari. Even the state statute at issue in this matter was incorrectly cited to this Court.

Petitioner Thrash does not even argue that the primary holding of the Court of Appeals decision – that Jury Instruction Number 15 was blatantly incorrect – was in error.

Respondent Gulliford respectfully requests that the petition for writ of certiorari be denied.

Following the Court of Appeals' denial of Petitioner Thrash's "Motion to Recall Mandate" pursuant to the Ninth Circuit's authority to deny a motion for recall/stay when the petition is "frivolous or filed merely for delay" (Ninth Circuit Rule 41-1), Respondent requests damages in an amount sufficient to cover the cost of printing the brief in opposition, pursuant to Supreme Court Rule 42.2.

Dated: July 24, 1998

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